THE NEW YORK HERALD

BOOKS *and* MAGAZINE

SECTION EIGHT ✦ NEW YORK, SUNDAY, NOVEMBER 26, 1922. THIRTY-TWO PAGES

The District Attorney: His Office

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This is the first of a series of monographs on the subject of the District Attorney, his problems and his functions, by Mr. Arthur Train, the author of "Tutt and Mr. Tutt," "The Confessions of Artemus Quibble," "The Prisoner at the Bar," "Courts, Criminals and the Camorra" and other books dealing with the intricacies and the romance of the law. Subsequent parts of the monograph will treat of the District Attorney and his temptations; the District Attorney and the accused, and the District Attorney and his difficulties.

THE "police play" and the detective story—not to mention even higher forms of dramatic and literary expression—have made the public prosecutor a familiar figure. Every child who attends the movies knows that a "district attorney" is an unscrupulous villain in league with all the forces of evil while masquerading as a St. George. His usual object is to get rid of his rival for the hand of the Governor's daughter, by convicting him of a murder of which he is innocent, and to hurry him to the electric chair. This enables the Governor to issue a reprieve for the hapless victim in the final reel, and by removing the District Attorney from office, to cast him into the outer political and social darkness where he belongs.

The dramatic possibilities of the prosecutor as literary material were not fully realized by authors and playwrights until the appearance of the gallant figure of William Travers Jerome in the earlier years of the present century. Almost immediately the curtain to every second act arose upon a ground glass door bearing the then mystic words, "District Attorney's Office." From said door emerged at the crucial instant an official Sir Galahad—brave, resourceful, always young and clad in a nobby business suit and bowler hat. He smoked cigarettes; the Senatorial villain puffed cigars. But there was nothing to it. Galahad always landed a knockout on Beelzebub's solar plexus, and the play ended with the powers of darkness on the run.

Everybody got tired of Galahad after a while, and by a natural involution, due to the necessity of giving the audience the customary jolt in the last act, the pure and stalwart young District Attorney had perforce to be transmogrified into the villain he now is. He may, in a year or so, reacquire his virtue, or he may be thrown out entire as "old stuff." At present, however, he is a bad egg, and we all know it.

Most people, having a limited personal experience, gain their impressions of life and character from fiction and the drama, spoken or celluloid. They are also influenced by tradition, and the traditional prosecutor is a bull necked gladiator with an undershot jaw, who has no mercies, even if he be not destitute of bowels, and who would cheerily send his grandmother to jail for stealing a banana.

Trial by Battle.

The public are not altogether to blame for this. The District Attorney, after a certain point in legal proceedings, should and does become a sort of legal gladiator. This is partly because all court trials still retain a distinct flavor of their origin. They are actual contests—no less bitter or intense because conducted according to the Queensberry rules of legal etiquette. For thousands of years the only way of punishing crime was by doing it one's self. Private vengeance was the basis of all criminal procedure. The aggrieved and the aggressor simply fought it out with whatever weapons they had. Even after the institution of organized judicial procedure a recognized method of deciding whether or not a person charged with murder was guilty was by handing him a club of a certain standard shape, size and weight, supplying his accuser with another, and letting them "go to it." If one of the parties did not happen to be handy with clubs he was allowed to put in a substitute before the gong rang, and the thing was fought out by proxy. The combat lasted "from sunrise to starlight," or so long as either survived. This right of "trial by battle" or the "appeal of death" was not abolished in England until 1821, in which year a defendant accused of murder having claimed it, the Court of King's Bench held it to be still existant. However, as the official clubs had been accidently mislaid by some Beefeater in the Tower, and could not be found, the prisoner, having been convicted in the common or garden way, was hanged after all—with due legal apologies.

This had always been the historic way of settling difficulties not only between individuals but between tribes and nations as well. Did not Hector fight with Achilles between the drawn up Greeks and Trojans? Did not the Israelites and the Philistines leave the issue to David's sling and Goliath's spear? Trial by battle was by no means peculiar to Anglo-Saxon jurisprudence. But this mode of individual redress colored all English legal procedure and colors ours to-day—including our ideas of what a prosecutor is or should be like, if he runs true to type.

There was so much that was unsatisfactory about this prize ring "justice" that it was gradually abandoned. One reason was that a rich man might corner the entire supply of fighting men and leave his poorer opponent without any champion whatever. This is a practice sometimes resorted to by wealthy litigants even to-day.

Another method of trial in criminal cases fully recognized by English law long after the organization of the "assize" (or jury) was by the so called "ordeal." This was either by fire or water. "Those who were tried by the former," says Bouvier, "passed barefooted and blindfolded over nine hot glowing plow shares or were to carry burning irons in their hands, and according as they escaped or not they were acquitted or condemned. The water ordeal was performed either in hot or cold water. In cold water the parties suspected were adjudged innocent if their bodies were not borne up by the water contrary to the course of nature; and if after putting their bare arms or legs into scalding water they came out unhurt they were taken to be innocent of the crime." The theory was that God would suspend the ordinary laws of nature in favor of the innocent. In other words, if the barons or knights assembled in "assize" decided that there was enough evidence to warrant putting a man on trial for crime, both the law of nature and the law of reason, operating naturally and reasonably, inclined toward conviction.

In like manner persons accused of witchcraft were bound with ropes and thrown into ponds. If they floated, as might reasonably be expected of an air filled body further sustained by rope, they were held to be guilty.

The presumption therefore was that a man formally accused of crime was guilty—not that he was innocent. Indeed, as late as the fourteenth century the idea seemed to be that unless there were a few men on the jury who had already formed a provisional opinion as to the defendant's guilt the prosecution would not have a fair chance; and in Willoughby's case in 1340 the Judge (Parning) somewhat naively remarked: "In such case the inquest should be taken by the indictors (the accusers) and others. Certainly if the indictors be not there it is not well for the King." Since out of the "assize" grew not only the Grand Jury, but the trial, or petit, jury as well, and since the prosecutor represents the public, who are the real accusers through these representative bodies, historically at least, there is some reason for the popular impression that the proper function of the prosecutor who directs the great machinery of the criminal law and procedure is to see that persons properly accused of crime are convicted. That is what he is there for, and what he is paid for, and if he makes political capital out of his emotions, or indulges in the luxury of an ostentatious mercy at the expense of the taxpayers, he is no good and ought to be thrown out. Mercy is no part of his job. His function, once an indictment has been found on adequate evidence, is to present the case with all his vigor and to act as the accuser's (the people's) representative.

After the defendant has been found guilty it is the Judge's business and nobody's else to take the responsibility of deciding what shall be done with him. To this extent, therefore, the popular conception of a prosecutor as a "hard" man is not only sound, but as it should be. Once in court he is in truth a gladiator, a "champion"—engaged in a struggle to prove the defendant's guilt with another gladiator who is seeking to establish his innocence. He has no more right to "let up" on a defendant than a lawyer has in a civil case to "confess judgment," or to yield up his client's money under an impulse of generosity; no more right to conclude that the prisoner ought to be given another chance than had the Judge in a recent case chronicled in the daily press to discharge the prisoner brought before him for theft on the ground that the latter had been stealing for his wife, who was confined in a hospital. This misguided member of the judiciary failed to distinguish between mercy and duty, or to perceive that neither was inconsistent with the other. Instead of conniving at theft, as he practically did, he should have found the thief guilty, instructed him as to the best means of securing relief from the proper sources and suspended sentence. But no! The temptation to display to an admiring public the largeness of his heart was too great to be resisted, and he preferred the plaudits of the hangers on to the purity of his judicial ermine.

Why Prosecutors Go Wrong.

Yet it is owing to such fundamental misconceptions as to the functions of prosecution that so many district attorneys "go bad." The power of a prosecutor, particularly in a large city, is so vast that unconsciously he all too often comes to regard himself as a sort of Alcalde, who dispenses justice as a favor and not as a right belonging to the citizen who demands it. He takes it upon himself to decide what ought to be done in every case; and if he concludes that the complaining witness is a mean sort of fellow he kicks him (and very likely a perfectly good case) out of his office. This may not work much harm in certain instances; the fatal error lies in the fact that in so doing he has abandoned the real and only test, which should be applied in every case—namely, that of whether the complainant who has come to him for relief has suffered a violation of his rights. Once a prosecutor gets inoculated with the virus of arbitrary power he becomes the tool of rascals, of politicians, and of his own ambitions alike. The moment he allows himself to be swayed by any consideration whatever—personal, political, social or financial—other than that of enforcing the law strictly in such cases as come to his notice, from that moment he is a menace to the community far more dangerous than any "Red," whose only hope lies in demonstrating that constitutional government is but a cloak for tyranny.

Probably there are no public officers in Christendom wielding an immediate authority over a greater number of human beings than the public prosecutors of New York, Chicago, San Francisco, St. Louis and Philadelphia. To at least half of the city's inhabitants, and often to many more, he represents the final appeal for justice. Theoretically it is possible for any citizen who has been wronged to "get his rights" by applying to the nearest magistrate. But in point of fact, unless he has the cooperation of the District Attorney here and later he can accomplish little. The prosecutor generally has a representative in every police court, whose business it is to press criminal charges when the complainant has no attorney, but it is clear that if he does so without enthusiasm the magistrate is not likely to "hold" the accused for trial, particularly as he knows the the District Attorney can "kill" the case later on, either by delaying its presentation to the Grand Jury, damning it with faint praise before that highly amenable body (of which he is the legally

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